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Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAUL OSUNA GUERRERO, Defendant and Appellant.	H041900 (Santa Clara County Super. Ct. No. C1476320)

Following a jury trial, defendant Raul Osuna Guerrero was convicted of forgery (Pen. Code, § 476),[1] identity theft (§ 530.5, subd. (c)(1)), concealing or withholding stolen property (§ 496, subd. (a)), and contempt of court (§ 166, subd. (a)(4)). The trial court found a "strike" allegation to be true (§§ 667, subds. (b)-(i), 1170.12), which made defendant eligible for sentencing under the Three Strikes law.

On appeal from the judgment of conviction, defendant argues that the trial court erred by (1) failing to reduce his forgery conviction to a misdemeanor pursuant to section 473, subdivision (b), (§ 473(b)), which was added by amendment in November of 2014, and (2) not properly instructing the jury on the charge of concealing or withholding stolen property (§ 496, subd. (a)). Defendant also asserts that defense counsel provided ineffective assistance by failing to alert the court that it had imposed an unauthorized felony sentence on his forgery conviction.

[1] All further statutory references are to the Penal Code unless otherwise stated.

After this court filed its opinion in December of 2018, the Supreme Court granted review (*People v. Guerrero*, review granted on March 13, 2019, S253405). In its ensuing opinion, the Supreme Court addressed the scope of section 473(b)'s identity theft exception, which precludes misdemeanor treatment of some forgeries otherwise eligible for such treatment and reversed this court's judgment. (See *People v. Guerrero* (2020) 9 Cal.5th 244, 253.) In accordance with the court's instructions, we now remand the matter to the trial court to reduce defendant's forgery conviction to a misdemeanor. (See *ibid*.)

I

Procedural History

A second amended information filed against defendant charged him with two misdemeanors and two felonies: a violation of section 530.5, subdivision (c)(1) (acquiring or retaining possession of personal identifying information of another), a misdemeanor (count 1); a violation of section 496, subdivision (a) (concealing or withholding stolen property), a felony (count 2); a violation of section 166, subdivision (a)(4) (contempt of court), a misdemeanor (count 3); and a violation of section 476 (forgery by possession of fictitious bill), a felony (count 4).[2] Counts 1, 2, and 4 were alleged to have occurred on or about February 12, 2014. Count 3 was alleged to have occurred on or about February 14, 2014. A "strike" (a prior robbery conviction)

[2] Section 530.5, subdivision (c)(1), states: "Every person who, with the intent to defraud, acquires or retains possession of the personal identifying information . . . of another person is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment." Section 476 provides: "Every person who makes, passes, utters, or publishes, with intent to defraud any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of any real or fictitious financial institution as defined in [s]ection 186.9 is guilty of forgery."

within the meaning of the Three Strikes law was also alleged. (See §§ 667, subds. (b)-(i), 1170.12.)

A jury found defendant guilty of all charges. The trial court found the strike allegation true.

After the voters approved the Safe Neighborhoods and Schools Act (Proposition 47) and it went into effect (see Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47; Cal. Const., former art. II, § 10), and before the court sentenced defendant on January 5, 2015, defense counsel filed a written request asking the court to reduce count 4 (forgery under § 476) from a felony to a misdemeanor pursuant to section 17, subdivision (b). The request stated that the offense was for possession of a counterfeit $50 bill.

At the time of sentencing, the trial court denied the defense request to reduce count 4 to a misdemeanor pursuant to section 17, subdivision (b). The court explained the bases of its decision, namely that defendant stood convicted of multiple violations, he had "a long and virtually uninterrupted history of criminal conduct," and there was nothing in the circumstances of the offense to justify treating it as a misdemeanor. The court "recognize[d] that the single check that was made out to the defendant" did not exceed $950, but that was not "the test" under section 17, subdivision (b). The court also denied defendant's *Romero* motion (see *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 504).

The parties and the court agreed that count 2 (§ 496, subd. (a)) had been reduced to a misdemeanor by operation of law under Proposition 47, and the court deemed the offense a misdemeanor. The court sentenced defendant to a four-year term (double the two-year midterm under the Three Strikes law) on count 4 (forgery) and to concurrent two-month terms on counts 1, 2, and 3.

II

Facts

On February 12, 2014, two officers separately responded to a call of a party reporting that her father, defendant, was refusing to leave her apartment. Defendant was placed under arrest for violating a no-contact protective order. During a search of defendant, an officer found a wallet with a marijuana emblem on it in defendant's jacket and put it in a plastic bag with defendant's other personal items.

When defendant was booked into Santa Clara County's jail later that same day, a correctional officer inventoried defendant's personal property. In defendant's wallet, the officer found five checks, including a $400 check, dated February 10, 2014, written on the bank account of St. Thomas More Society of Santa Clara County (STMS), a Catholic organization for judges, lawyers, law professors, and law students. The STMS check found in defendant's possession was made out to a "Raul" with an indecipherable last name beginning with "G"; the signature on the check was illegible. What appears to be defendant's signature was on the back of the check.

In early February 2014, the society's financial documents and all its checks had been taken from a vehicle belonging to Chris Boscia, who was then the society's treasurer. The treasurer was the person authorized to write checks for the organization. The STMS check found in defendant's possession was dated after the checks had been taken from Boscia's vehicle, and it had not been signed by Boscia. The payee was not a person to whom the organization had written a check. Defendant did not have a vendor or payee relationship with the society. Defendant was not authorized to be in possession of the check. In mid-March 2014, the society's former treasurer received a call from Bank of America's fraud department, and he was informed that two of the stolen checks had been presented for cashing.

The four other personal checks found in defendant's wallet were from three individuals other than defendant. One of the personal checks appeared to have been

made out to "DMV Renewals," and the name of the original payee had been written over. There was an illegible signature on the back. The checks recovered from defendant's wallet also included two checks from the bank account of Alberta Espinoza, who had been living in the same apartment complex as defendant's daughter sometime in March 2013. One of the Espinoza checks was made out to "daniel Rosbach" [*sic*] in the amount of $380, and the other check was blank. A fourth personal check, written on the bank account of a third person, was written for $200 and made payable to "Daniel Rosbach." There were illegible signatures on the back of both checks made payable to Rosbach. Defendant's wallet also contained a counterfeit $50 bill, a woman's California driver's license, and a State of California benefits identification card in the name of an individual other than defendant.

During a separate incident on November 16, 2013, an officer searched defendant's wallet, which had been found in defendant's right rear pants pocket. The officer found five counterfeit $20 bills and two counterfeit $10 bills in the wallet.

In an earlier incident on June 2, 2013, an officer searched defendant's wallet, which was found in defendant's pocket. The officer found two social security cards that did not belong to defendant in the wallet. The names on the cards were Joseph Mike Ramirez and Enrique Chavez Santos.

When an officer contacted Ramirez by telephone, Ramirez reported that he had lost his social security card. Ramirez told the officer that he did not know defendant and that defendant did not have his permission to possess his social security card. The officer also determined, through a database search, that 42 different people had used the social security number appearing on Santos's social security card.

Defendant, who testified in his own behalf, admitted that he had endorsed the STMS check that had been found in his wallet on February 12, 2014 and that he had planned on depositing the check in his own bank account. Defendant also admitted that

he had been previously convicted of violating Health and Safety Code section 11359 (possession of marijuana for sale) and second degree robbery.

III

Discussion

A. *Count 4—Forgery*

Under section 473(b), as added by Proposition 47 (see Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, § 6, p. 71), forgery was a misdemeanor, rather than a wobbler, under specified circumstances. However, subdivision (b) contained the following exception: "This subdivision shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5."

This court's original opinion affirmed the judgment against defendant, who had been convicted of both forgery and of identity theft. (*People v. Guerrero* (Oct. 11, 2016, H041900) [nonpub. opn.].) The California Supreme Court granted review (*People v. Guerrero*, review granted Feb. 15, 2017, S238401) but ultimately transferred the matter to this court with directions to vacate our decision and to reconsider the cause in light of *People v. Gonzales* (2018) 6 Cal.5th 44 (*Gonzales*). We did so and again affirmed the judgment. (*People v. Guerrero* (Dec. 5, 2018, H041900) [nonpub. opn.].)

The defendant in *Gonzales* had "[i]n a single consolidated proceeding, . . . pleaded guilty to multiple offenses stemming from three different cases, including four counts of check forgery arising from conduct that occurred in 2003 and one count of identity theft committed in 2006." (*Gonzales, supra,* 6 Cal.5th at p. 46.) In *Gonzales*, the Supreme Court concluded that there had to be some connection or relationship between a person's forgery and the identify theft convictions for the person to come within section 473(b)'s exception. (*Gonzales, supra,* at pp. 46, 51-55.) But the court expressly "decline[d] to adopt a 'transactionally related' standard." (*Id*. at p. 53.) The Supreme Court concluded that the defendant Gonzales's "offenses were entirely unrelated and therefore not subject to exclusion under section 473(b)." (*Id*. at p. 47.)

Following our second opinion in this case, the Supreme Court once more granted review (*People v. Guerrero* (S253405)). In *People v. Guerrero*, *supra*, 9 Cal.5th 244, the Supreme Court revisited the "some connection or relationship" test that it had articulated in *Gonzales*. It concluded that "[a] meaningful connection between forgery and identity theft for purposes of the identity theft exception requires a *facilitative* relationship between the two offenses." (*Id*. at p. 246, italics added.) The Supreme court held that "the meaningful connection requirement of section 473(b)'s identity theft exception is satisfied only if a defendant convicted of forgery is also convicted of identity theft in the same proceeding and only if one of the offenses facilitated the other." (*Id*. at p. 253.) It made clear that a defendant's mere possession of "two separate items of contraband at the same time does not demonstrate such a facilitative relationship." (*Ibid*.)

As to defendant in this case, the Supreme Court concluded: "Because Guerrero had not yet been sentenced at the time Proposition 47 became effective, its ameliorative provisions apply directly to his case. (*People v. Lara* (2019) 6 Cal.5th 1128, 1135.)" (*People v. Guerrero*, *supra*, 9 Cal.5th at p. 253.) The court stated that "the stolen identification information and the counterfeit $50 bill were not shown to be connected in any way except that they were both found in Guerrero's wallet" (*ibid*.) and that "[t]here was no evidence that Guerrero used the stolen information to obtain the counterfeit bill." (*Ibid*.) Consequently, it found that in the absence of a facilitative relationship, section 473(b)'s exception did not apply. (*Guerrero*, *supra*, at p. 253.) The court further stated: "It is uncontested that the only evidence supporting [defendant Guerrero's] forgery conviction was the counterfeit $50 bill, which is valued at far less than the $950 threshold below which a forgery conviction must be punished as a misdemeanor. Guerrero is therefore entitled to reduction of his forgery conviction to a misdemeanor." (*Ibid*.) The court reversed this court's judgment and instructed this court to remand to the trial court to reduce Guerrero's forgery conviction to a misdemeanor" (*ibid*.). We do so now.

This disposition makes it unnecessary to address defendant's ineffective assistance of counsel claim.

B. *Alleged Instructional Errors Related to Count 2*

1. *Background*

In the court below, defense counsel objected to the court's giving of CALCRIM No. 376 (Possession of Recently Stolen Property as Evidence of a Crime) on the ground that it "seem[ed] to be circular in that . . . if you believe he had possessed stolen property, then it relates to [c]ount [t]wo" and involved "a piggybacking or circular argument." She did not object on due process grounds or on the ground that the instruction allowed jurors to draw an unconstitutional permissive inference.

The trial court gave a modified CALCRIM No. 376 instruction: "If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of Count Two, possession of stolen property, based on those facts alone. [¶] However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed possession of stolen property. [¶] The supporting evidence need only be slight. It need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, whether the property was modified or altered, along with any other relevant circumstances tending to prove his guilt of Count Two, possession of stolen property. [¶] *Remember that you may not convict defendant of any crime unless you are convinced that each fact essential to the conclusion that defendant is guilty of the crime has been proved beyond a reasonable doubt*." (Italics added.)

The trial court instructed the jury on count 2 pursuant to CALCRIM No. 1750, modified as follows: "The defendant is charged in Count Two with receiving, concealing or withholding stolen property in violation of Penal Code section 496(a). [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] One. The

defendant received, concealed or withheld from its owner, or aided and abetted in concealing or withholding from its owner property that had been stolen. [¶] Two. When the defendant received, concealed or withheld from its owner, or aided in concealing or withholding from its owner property, he knew that the property had been stolen. [¶] And three. [T]he defendant actually knew of the presence of the property. [¶] Property is stolen if it was obtained by any type of theft. Theft includes obtaining property by larceny or misappropriation of [lost] property. [¶] You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one stolen item and you agree on which stolen item he possessed."

2. *Instruction Pursuant to CALCRIM No. 376*

Defendant argues that his state and federal rights to due process were violated by the trial court's instruction pursuant to CALCRIM No. 376 and that the instruction impermissibly diluted the reasonable doubt standard by telling the jury that "it only needed 'slight' supporting evidence to find the knowledge element of possession of stolen property [was] proven beyond a reasonable doubt."

"A long line of authority, culminating in *People v. McFarland* (1962) 58 Cal.2d 748, establishes that proof of knowing possession by a defendant of recently stolen property raises a strong inference of the other element of the crime: the defendant's knowledge of the tainted nature of the property. This inference is so substantial that only 'slight' additional corroborating evidence need be adduced in order to permit a finding of guilty. (*Id*. at p. 754.)" (*People v. Anderson* (1989) 210 Cal.App.3d 414, 421.)

In *McFarland*, the California Supreme Court explained: "Possession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt. [Citations.] This court stated in *People v. Lyons*, 50 Cal.2d 245, 258[:] '[P]ossession of stolen property, accompanied by no explanation or an unsatisfactory explanation of the possession, or by suspicious circumstances, will justify

an inference that the goods were received with knowledge that they had been stolen. The rule is generally applied where the accused is found in possession of the articles soon after they were stolen.' [Citations.]" (*McFarland, supra,* at p. 754.)

The substance of CALCRIM No. 376 was in effect approved in *People v. Gamache* (2010) 48 Cal.4th 347 (*Gamache*), which considered CALJIC No. 2.15, an analogous instruction. In that case, the California Supreme Court stated: "CALJIC No. 2.15 is an instruction generally favorable to defendants; its purpose is to emphasize that possession of stolen property, alone, is insufficient to sustain a conviction for a theft-related crime. [Citations.] In the presence of at least some corroborating evidence, it permits—but does not require—jurors to infer from possession of stolen property guilt of a related offense such as robbery or burglary. We have held the instruction satisfies the due process requirement for permissive inferences, at least for theft-related offenses: the conclusion it suggests is ' "one that reason and common sense justify in light of the proven facts before the jury." ' [Citations.]" (*Gamache, supra,* at p. 375; accord, *People v. Potts* (2019) 6 Cal.5th 1012, 1042-1043.)

In *People v. Seumanu* (2015) 61 Cal.4th 1293 (*Seumanu*), the defendant contended that CALJIC No. 2.15 "violated his constitutional rights by establishing a 'permissive inference of guilt based on evidence of conscious possession of recently stolen property' and, because the rule provides that only slight corroboration is thereafter needed, it dilutes the 'ineluctable rule that a criminal conviction may be predicated only on proof beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.)' " (*Seumanu, supra,* at p. 1350.) The California Supreme Court rejected that argument: "We have also previously addressed and rejected defendant's reasonable doubt argument, holding CALJIC No. 2.15 'does not establish an unconstitutional mandatory presumption in favor of guilt [citation] or otherwise shift or lower the prosecution's burden of establishing guilt beyond a reasonable doubt [citations].' (*People v. Gamache, supra,* 48 Cal.4th at p. 376.) Further, 'nothing in the instruction . . . relieves the prosecution of its burden to

establish guilt beyond a reasonable doubt.' [Citations.] Because defendant advances no persuasive reason why our previous authority addressing this issue was in error, we adhere to them now and reject the claim that CALJIC No. 2.15 violated his constitutional rights." (*Id*. at p. 1351.)

The United States Supreme Court has generally permitted instruction concerning a permissive inference, "which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. [Citation.]" (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) The court stated: "In that situation the basic fact may constitute prima facie evidence of the elemental fact. [Citations.] When reviewing this type of device, the Court has required the party challenging it to demonstrate its invalidity as applied to him. [Citation.] Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." (*Ibid*.)

"A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." (*Francis v. Franklin* (1985) 471 U.S. 307, 314.) "A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." (*Ibid*.) "A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. [Citation.]" (*Id*. at pp. 314-315; see *People v. Goldsmith* (2014) 59 Cal.4th 258, 270 ["Permissive inferences violate due process only if the permissive inference is irrational. [Citations.]"].)

Defendant has failed to demonstrate that CALCRIM No. 376's permissive inference was irrational in this case, or that the court's instruction concerning the

permissive inference reduced the prosecution's burden of proof. Defendant acknowledges that the evidence showed that he was in "possession of other contraband items" in addition to the stolen STMS check and that he had been in "possession of contraband items" on two prior occasions. As indicated, the evidence showed that defendant possessed multiple checks not belonging to him, including a stolen STMS check that was made out to and endorsed by him, someone else's state benefits card, someone else's driver's license, and a counterfeit $50 bill. On prior occasions, he had been found in possession of social security cards belonging to other persons and multiple counterfeit bills. Under the facts of this case, the permissive inference permitted under the court's instruction was rational.

Moreover, the challenged instruction specifically reminded the jurors that they "may not convict defendant of any crime unless [they] are convinced that each fact essential to the conclusion that defendant is guilty of the crime has been proved beyond a reasonable doubt." The court gave extensive instructions on the presumption of innocence and the People's burden to prove defendant guilty beyond a reasonable doubt.

Defendant points out that a number of federal courts of appeals have reversed convictions where a trial court instructed a jury that "[o]nce the existence of the agreement or common scheme of conspiracy is shown, . . . slight evidence is all that is required to connect a particular defendant with the conspiracy." (*United States v. Partin* (5th Cir. 1977) 552 F.2d 621, 628 (*Partin*)[3], italics omitted; see *United States v. Dunn*

[3] The Fifth Circuit Court of Appeals has consistently condemned the giving of a "slight evidence" instruction regarding a defendant's connection to a criminal conspiracy. (See e.g. *United States v. Gray* (5th Cir. 1980) 626 F.2d 494, 500 ["The 'slight evidence' reference can only be seen as suffocating the 'reasonable doubt' reference."]; *United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256 ["erroneous instruction reduced the level of proof necessary for the government to carry its burden by possibly confusing the jury about the proper standard or even convincing jury members that a defendant's participation in the conspiracy need not be proved beyond a reasonable doubt" (fn. omitted)]; *Partin, supra,* 552 F.2d at p. 628 [appellate court bound by precedent to reverse]; *United States v. Marionneaux* (5th Cir. 1975) 514 F.2d 1244, 1249 [following

(9th Cir.1977) 564 F.2d 348, 356-357 [restating the "slight evidence" rule to clarify that defendant's connection to the conspiracy need only be slight, but the connection must be proved beyond a reasonable doubt].) These cases do not convince us that the "slight evidence" instruction being challenged in this case unconstitutionally reduced the People's burden of proof.

The "slight evidence" instruction in criminal conspiracy cases, which some federal courts have denounced, permitted juries to find that a defendant was a participant in a criminal conspiracy based on "slight evidence." The "slight evidence" instruction at issue here is distinguishable because it permits the jury to draw a permissive inference of guilt in a theft-related case from the evidence of predicate facts (knowing possession of property proved to be recently stolen and at least slight, additional supporting evidence of guilt), provided the People have proved every fact essential to a guilty verdict beyond a reasonable doubt.

In light of the entirety of the charge in this case (see *People v. Salazar* (2016) 63 Cal.4th 214, 248), the court's instruction pursuant to CALCRIM No. 376 did not violate due process by allowing the jury to draw an unconstitutional permissive inference or by unconstitutionally lowering the prosecution's burden of proof. (Cf. *People v. Moore* (2011) 51 Cal.4th 1104, 1130-1133; *Gamache, supra,* 48 Cal.4th at pp. 374-376.)

3. *Instruction Pursuant to CALCRIM No. 1750*

Defendant argues that the trial court's instruction pursuant to CALCRIM No. 1750 violated his constitutional right to due process of law by failing to define "aiding and

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Brasseaux]; *United States v. Brasseaux* (5th Cir.1975) 509 F.2d 157, 162 [Two possible dangers inherent in the "slight evidence" instruction: "First, the jury might be led to conclude that a defendant's participation in the alleged conspiracy need not be proved beyond a reasonable doubt. Second, they might simply become confused regarding the proper standard for linking a defendant to a conspiracy"; but court affirmed judgment because defendant failed to object below and court reiterated in several places in its instructional charge that each element of the offense must be proved beyond a reasonable doubt].)

abetting." Defendant contends that the trial court had a duty to instruct sua sponte on the meaning of that phrase because there was substantial evidence of aiding and abetting. He asserts that the court should have given CALCRIM Nos. 400 (Aiding and Abetting: General Principles) and 401 (Aiding and Abetting: Intended Crimes).[4] Defendant claims that "substantial evidence showed that persons other than [he] may have been direct principals in the theft and/or possession of the stolen STMS checks." He asserts that this court must reverse the conviction for violating section 496, subdivision (a), because the People cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict." (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Under section 496, subdivision (a), "[e]very person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or *aids in concealing, selling, or withholding any property from the owner*, knowing the property to be so stolen or obtained" (italics added) commits a crime. We assume for purposes of this appeal that a person is guilty of violating section 496 by aiding "in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained" only if the person is liable as an aider and abettor and that a trial court is required to instruct on each element of aiding and abetting. We nevertheless conclude that any error by the trial court in failing to give an aiding and abetting instruction was harmless.

According to defendant's testimony at trial, he endorsed the STMS check for $400, which was made out to him, after his daughter (who exercised her Fifth Amendment right against self-incrimination when called as a witness at trial by

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[4] "[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.)

defendant) showed him the check, indicated that she had received it from an assistance group that was helping her to cover her bills, and told him that she needed to pay her bills. Defendant claimed that he intended to have the STMS check deposited into his bank account and then allow his daughter to withdraw $400 from his account. Defendant's testimony did not establish that he was merely aiding his daughter's commission of the crime of concealing or withholding stolen property.

The stolen STMS check was found in defendant's wallet, which he was carrying, on February 12, 2014. That check appeared to have been made payable to defendant, he endorsed it, and he planned on depositing it into his own bank account. All evidence pointed to defendant's guilt as a direct perpetrator. The evidence that multiple STMS checks had been taken from the vehicle of the society's treasurer and the evidence that, after the stolen STMS check was found in defendant's possession, there had been attempts to cash two different STMS checks did not support an inference that defendant was merely aiding his daughter or some other unknown direct perpetrator in the concealing or withholding of the stolen STMS check found in his wallet.

Even though the court's instruction suggested that defendant could be found guilty of violating section 496, subdivision (a), if he aided and abetted in concealing or withholding stolen property from its owner, the prosecutor did not rely on an aiding and abetting theory. Further, the court specifically told the jury: "Some of these instructions may not apply depending on your findings about the facts of the case. Don't assume that just because I give a particular instruction, I am suggesting anything about the facts. [¶] After you have decided what the facts are, then follow the instructions that do apply to the facts as you find them." Under the instructions given, the jury necessarily found that defendant knew that the property (a check) had been stolen and he knew of its presence. Based on the evidence, the jury could not have rationally found that defendant was not guilty as a direct perpetrator but was guilty as an aider and abettor. The error, if any, in failing to specifically instruct on aiding and abetting was harmless beyond a

reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24; see *Neder v. United States* (1999) 527 U.S. 1, 8-16 [instruction that omits an element of offense is subject to harmless error analysis under *Chapman*]; *People v. Dyer* (1988) 45 Cal.3d 26, 64 [*Chapman* standard of review applies to *Beeman* error].)

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for the limited purpose of reducing Guerrero's forgery conviction to a misdemeanor.

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ELIA, J.

WE CONCUR:

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PREMO, ACTING P.J.

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MIHARA, J.

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